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(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
City of Ames, Iowa	)	
Permittee	)	NPDES Appeal No. 94-6
Docket No. IA-70035955	)	

[Decided April 4, 1996]

ORDER GRANTING REVIEW IN PART
AND REMANDING IN PART

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

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City of Ames, Iowa

NPDES Appeal No. 94-6

ORDER GRANTING REVIEW IN PART AND REMANDING IN PART

Decided April 4, 1996

Syllabus

The City of Ames, Iowa ("The City") has filed a petition seeking review of the denial of its evidentiary hearing request by the Regional Administrator of U.S. EPA Region VII. The City's evidentiary hearing request challenged aspects of the Region's final permit decision on renewal of the City's NPDES permit for the City's waste water treatment plant (a publicly owned treatment works or "POTW"). On appeal, the City raises various arguments that may be consolidated into two main issues. The first issue relates to an Iowa statute, Iowa Code § 455B.173(3), which provides that a newly constructed POTW, like the City's, shall not be required to comply with effluent limitations that are more stringent than those contained in its original permit for a period of 10 to 12 years. On appeal, the City argues that the Region is required to give effect to this statute by including in the City's permit a provision allowing the City to delay compliance with the permit's effluent limitations for ammonia nitrogen and CBOD5 until 1998. The second issue raised in the City's petition is whether the permit's effluent limitations for ammonia nitrogen and CBOD5 may be stated as maximum daily limits, without violating 40 C.F.R. § 122.45(d), which requires that discharge limits for POTWs be stated as weekly and monthly average limits (as opposed to maximum daily limits) "unless impracticable."

Held: With respect to Iowa's moratorium statute, the Environmental Appeals Board is granting review of, and requesting briefing on, the following issues: Whether the Iowa moratorium statute is of a type that could authorize establishing a compliance schedule under *In re Star-Kist Caribe, Inc.* and if so, whether the fact that Iowa's moratorium statute was apparently never approved by EPA precludes the Region from giving consideration to it for this purpose. With respect to the inclusion of daily maximum limits in the permit, the Board concludes that: (1) The Regional Administrator erroneously relied upon State certification in denying a hearing on the permit's maximum daily limits for ammonia nitrogen and CBOD5; and (2) The Regional Administrator appears to have misread section 122.45(d) to mean that maximum daily limits may be included in the permit even if the Region can ensure compliance with Iowa's water quality standards by including weekly average limits. In view of the foregoing conclusions, the Board is remanding the following issue to the Regional Administrator: Whether weekly average limits for those two pollutant parameters are "impracticable" for purposes of section 122.45(d).

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

On July 14, 1994, the Regional Administrator of U.S. EPA Region VII issued a final permit decision on an application filed by the City of Ames, Iowa ("the City") for a renewal of its National Pollutant Discharge Elimination System ("NPDES") permit. [1] The NPDES permit is for the City's waste water treatment plant (a publicly owned treatment works or "POTW"), which discharges into the

[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like the City's waste water treatment plant, must be authorized under a permit to be lawful. 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

South Skunk River. The City subsequently filed an evidentiary hearing request with the Regional Administrator, raising various factual and legal issues relating to the permit, which request was denied by the Regional Administrator. [2] Before us now is the City's petition seeking review of the Regional Administrator's denial of the City's evidentiary hearing request. [3]

For the reasons set forth below, we are granting review of, and requesting briefing on, two issues and remanding another issue for reconsideration by the Regional Administrator.

I. *BACKGROUND*

The State of Iowa ("the State") has been authorized to administer its own NPDES program, and in fact, the State, not EPA, issued the original NPDES permit for the City's POTW. The State also issued a draft renewal permit for the POTW, but the Region objected to the permit on the ground that it did not ensure compliance with Iowa's water quality standard for ammonia nitrogen. Attachment E, Region's Response to Petition. When the State refused to alter the permit to accommodate the Region's objections, the Region assumed authority to issue the permit itself. [4] The Region then issued its own draft renewal permit and provided a public comment period pursuant to the NPDES permitting procedures at 40 C.F.R. part 124.

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[2] Under 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the Regional Administrator's final permit decision.

[3] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requester may appeal any issue set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board.

[4] When EPA authorizes a State to create and administer its own NPDES permit system, it retains a supervisory role. 33 U.S.C. § 1342(d). Thus, before the State may issue a permit, it must submit the proposed permit to the Region, which then has ninety days to review the draft permit and raise objections. 33 U.S.C. § 1342(d)(2). If the Region objects, the Region must conduct a hearing on its objections if requested to do so by any interested party, including the State. 40 C.F.R. § 123.44(e) & (f). After such a hearing, the Regional Administrator is required to affirm, withdraw, or modify any objections that the Region has raised. 40 C.F.R. § 123.44(g). If the Regional Administrator affirms the objections, the State has thirty days to issue a modified permit that meets the Region's objections. 40 C.F.R. § 123.44(h)(2). If the State fails to issue a modified permit, EPA will assume authority for issuing the permit. 40 C.F.R. § 123.44(h).

The State had originally issued a draft renewal permit that would have satisfied the Region, but the City successfully challenged that permit's effluent limitations for carbonaceous biochemical oxygen demand (5-day) ("CBOD5") and ammonia nitrogen in an appeal before the Iowa Department of Inspections and Appeals. The City challenged those limitations because they were more stringent than the effluent limitations for those two pollutant parameters in its original NPDES permit issued in 1986. The State had made the effluent limitations more stringent to reflect changes in the water quality standards that occurred after the City's original permit was issued. Despite these changes in the water quality standards, the City contended that under Iowa Code § 455B.173(3), the State is precluded, until 1998, from requiring the City to comply with any effluent limitations that are more stringent than those in the City's original permit. Section 455B.173(3) provides as follows:

> A publicly owned treatment works whose discharge meets the final effluent limitations which were contained in its discharge permit on the date that construction of the publicly owned treatment works was approved by the department shall not be required to meet more stringent effluent limitations for a period of ten years from the date the construction was completed and accepted but not longer than twelve years from the date that construction was approved by the department.

Iowa Code § 455B.173(3).

On February 21, 1991, a State administrative law judge ruled for the City, agreeing that until 1998, the State was precluded under section 455B.173(3) from requiring the City to comply with effluent limitations that are more stringent than those in its original permit. Attachment C, Region's Response to Petition. The ALJ reasoned as follows:

> Whenever a more restrictive water quality standard is promulgated by the department, regardless of how that standard or standards would be promulgated, the application of the standard would be void and ineffective against a publicly-owned treatment works as long as the facility falls within the statutory time frame for the moratorium, set forth in Iowa Code section 455B.173(3). In the factual context of this contested case, * * * [*a]ny* more restrictive water quality standard promulgated by the department would be ineffective and void as applied against the City before October 24, 1998.

Attachment C, Region's Response to Petition (emphasis in the original). The ALJ's decision was subsequently upheld by the State's Environmental Protection Commission. Attachment F, Region's Response to Petition.

In response to the decision of this State tribunal, the State amended the draft permit by eliminating the stricter effluent limitations for ammonia nitrogen and CBOD5 and replacing them with limitations identical to those that were contained in the 1986 permit. The State then submitted this amended draft permit for EPA's review on September 25, 1991. As noted earlier, the Region objected to the State's draft permit and ultimately assumed authority for issuing the permit. The Region objected to the permit on the ground that the effluent limitation for ammonia nitrogen failed to ensure compliance with Iowa water quality standards for that pollutant, which standards were adopted December 19, 1990:

> Discharges in compliance with the limits in the draft permit for ammonia nitrogen would cause the receiving stream to exceed Iowa Water Quality Standards for that parameter, adopted on December 19, 1990. Section 301(b)(1)(C) of the Act, 33 U.S.C. 1311(b)(1)(C), and 40 C.F.R. § 122.44(d)(5) require that effluent limitations in NPDES permits not allow such standards to be violated. Objections to such effluent limits are specifically authorized by 40 C.F.R. § 123.44(c)(8). [5]

Attachment E, Region's Response to Petition.

To ensure compliance with the Iowa water quality standards, the Region included effluent limitations in the City's permit for ammonia nitrogen and CBOD5,[6] which limitations are more stringent than the effluent limitations for

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[5] Section 123.44(c) provides as follows:

> The Regional Administrator's objection to the issuance of a proposed permit must be based upon one or more of the following grounds:
>
> * * * * *
>
> (8) The effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d).

[6] In its first response to the State's draft permit, the Region expressed the same objection to the permit's effluent limitations for CBOD5 as it did with respect to the effluent limitations for ammonia nitrogen. *See* Letter to Allan Stokes, IDNR, from Morris Kay, EPA (Oct. 23, 1991),

(continued...)

those two pollutant parameters in the City's original permit. These effluent limitations include maximum daily limits in addition to monthly average limits. [7] The renewal permit also contains monitoring requirements (but not discharge limitations) for copper, cadmium, lead, silver, mercury and cyanide. The Regional Administrator issued his final permit decision on July 14, 1994.

On August 18, 1994, the City requested an evidentiary hearing on four factual issues and three legal issues. The seven issues in the City's request collectively focused on three aspects of the renewal permit: (1) the stringency of the effluent limitations for CBOD5 and ammonia nitrogen; (2) the presence of maximum daily limits for CBOD5 and ammonia nitrogen in the permit; and (3) the permit's monitoring requirements for copper, cadmium, lead, silver, mercury and cyanide. [8] The Regional Administrator denied an evidentiary hearing on all of the issues raised by the City, and the City appealed.

On appeal, the City has raised the following issues: (1) whether the Region was required to include a compliance schedule in the permit that would give effect to Iowa's 10-year moratorium statute (discussed above); (2) whether the Region's refusal to give effect to Iowa's 10-year moratorium statute and the decision of an Iowa administrative law judge interpreting that statute violates the 10th Amendment to the U.S. Constitution; (3) whether the Region's decision to include daily maximum limits in the permit violates 40 C.F.R. § 122.45(d)(2); (4) whether the imposition of a one-day maximum instead of an average limit will take from the City its investment-backed expectation for treatment capacity constituting an economic loss to the City in excess of $2.3 million; and (5) whether the imposition of a one-day maximum instead of an average limit creates an immediate risk of fines and penalties.

II. *DISCUSSION*

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[6](...continued)
Attachment D, Region's Response to Petition. In its formal objection letter, however, the Region, for reasons not apparent from the record, cited only the effluent limitations for ammonia nitrogen. *See* Letter to Larry Wilson, IDNR, from Morris Kay, EPA (Dec. 24, 1991), Attachment E, Region's Response to Petition.

[7] The City's original permit had weekly and monthly average limits, but no maximum daily limits. The monthly average limits in the original permit were less stringent than those in the Region's permit.

[8] Although the City mentions the metals monitoring requirements in the background section of its brief, it raises no issues on appeal concerning those requirements.

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Florida Pulp and Paper Association & Buckeye Florida, L.P.*, 5 E.A.D., NPDES Appeal Nos. 94-4 & 94-5, slip op. at 3 (EAB 1995). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board. [9] *See, e.g., In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 808 (EAB 1993). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a).

A. *Iowa's Ten-Year Moratorium Statute*

In its appeal, the City raises the issue of whether the Region is required to give effect to Iowa's 10-year moratorium statute by including in the permit a provision allowing the City to delay compliance with the permit's effluent limitations for ammonia nitrogen and CBOD5 until 1998. The Region argues that the moratorium provision is inconsistent with Federal law and thus provides no basis for postponing the effectiveness of the effluent limitations in the City's permit. For the reasons set forth below, we conclude that review should be granted and further briefing required on the following issues: Whether the Iowa moratorium statute is of a type that could authorize establishing a compliance schedule under *In re Star-Kist Caribe, Inc.* and if so, whether the fact that Iowa's moratorium statute was apparently never approved by EPA precludes the Region from giving consideration to it for this purpose.

As a starting point, we note that under section 301(b)(1)(C) of the Clean Water Act [10] and its implementing regulation at 40 C.F.R. § 122.44(d), the Region

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[9] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id*. *See In re J & L Specialty Products Corporation*, 5 E.A.D., NPDES Appeal No. 92-22, slip op. at 12 (EAB 1994).

[10] Section 301(b)(1)(C) provides that:

> In order to carry out the objective of this chapter there shall be achieved * * * (1)(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality

(continued...)

is required to include in the City's permit any "more stringent" effluent limitations that are necessary to ensure compliance with Iowa's water quality standards. The Region has included effluent limitations in the permit that are specifically tailored to meet the applicable Iowa water quality standards for ammonia nitrogen and CBOD5. The schedule of compliance being sought by the City would allow the City to postpone compliance with such effluent limitations until 1998. The Region, however, can include a schedule of compliance in the City's permit, without contravening section 301(b)(1)(C) of the Act, only if Iowa's water quality program authorizes the inclusion of such a provision. *See In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Adm'r. 1990), *modification denied*, 4 E.A.D. 33 (EAB 1992) ("If, on the other hand, a schedule of compliance is authorized by the State program, EPA's inclusion of interim limitations pursuant to the schedule would be fully consistent with, and therefore `meet,' the requirements of the State water quality standard as contemplated by §301(b)(1)(C).").

The Agency's decision in *Star-Kist* explores the issue of when and under what circumstances a State's program authorizes the Agency to include a permit provision allowing the permittee to delay compliance with a State water quality standard. That decision states that:

> [T]he only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance.

Star-Kist, 3 E.A.D. at 175. In considering whether Iowa's moratorium statute authorizes a schedule of compliance, as contemplated in *Star-Kist*, we see three distinct issues that require resolution. The first is whether the authorizing statute or regulation itself must meet the definition of "schedule of compliance." The second is whether the moratorium statute is of a type that could authorize establishing a compliance schedule under *Star-Kist*. The third is whether the lack of EPA approval of the moratorium provision precludes its consideration for this purpose.

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[10](...continued)
standard established pursuant to this chapter.

We begin with the first of these issues, whether the moratorium statute itself must meet the definition of a "schedule of compliance." That definition reads as follows:

> The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

CWA § 502(17), 33 U.S.C. § 1362. In its response to the City's appeal brief, the Region argues that Iowa's moratorium statute does not authorize a schedule of compliance, because "[t]he Iowa Code moratorium relied upon by the City fails to satisfy *any* element of the Clean Water Act's definition of schedule of compliance." Region's Response to Petition at 17.

We agree with the Region that Iowa's moratorium statute does not itself meet the definition of "schedule of compliance." This argument, however, confuses the schedule of compliance with the State statute or regulation that may authorize the schedule of compliance. A "schedule of compliance" is a permit provision. *See* 40 C.F.R. § 122.2 (defining schedule of compliance as "a schedule of remedial measures *included in a `permit*,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations") (emphasis added). For our purposes, the important question is not whether the moratorium statute itself meets the "schedule of compliance" definition, but whether it can fairly be construed, under the *Star-Kist* decision, as the type of statute or regulation *authorizing* the inclusion by the Region of a permit provision that meets the definition. That is the second issue that requires resolution in our *Star-Kist* analysis.

Guidance on the issue may be found in the following passage in *Star-Kist*:

> EPA may add a schedule of compliance to a permit when EPA is the permit issuer if a State has laid the necessary groundwork in its standards or regulations. In such circumstances, the schedule would be meeting the requirements of the State water quality standards, and therefore no basis would exist for challenging its validity.

Star-Kist, 3 E.A.D. at 177. Under *Star-Kist*, therefore, we must determine whether the moratorium statute lays the necessary groundwork for a schedule of compliance, such that compliance with the schedule would in some sense "meet" the water quality standards for ammonia nitrogen and CBOD5. It appears that Iowa's moratorium statute may be of a type that fits this description. The moratorium statute evidences a clear intent to allow a newly constructed POTW, like the City's, to postpone compliance with water quality standards more stringent than those contained in its original permit until the period set forth in that provision (ten years from completion of construction or twelve years from the approval of construction) has expired. Because it is part of Iowa's water quality program, any water quality standard that applies to a POTW that is subject to the statute is qualified by, and must be read in conjunction with, the moratorium statute. The moratorium statute appears to contemplate *more* relief than would be authorized under Federal law, and thus may not be given full effect by EPA to the extent that the relief it provides goes beyond that permissible under Federal law. [11] However, it may nonetheless be a sufficient expression of State intent to authorize whatever relief is permissible under Federal law. We believe

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[11] Any schedule of compliance included in the permit must comply with the requirements in the Clean Water Act or its implementing regulations defining and governing such provisions. To the extent Iowa's moratorium statute mandates a schedule of compliance that conflicts with these requirements, the Region would not be required to give effect to the moratorium statute. The application of a State law in a particular case is invalid to the extent that such application brings the State law into actual conflict with a federal statute, and "a conflict will be found when [a] state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *International Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 492 (1987) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)). If a simple moratorium is not permissible under the Clean Water Act and its implementing regulations, then giving effect to Iowa's 10-year moratorium statute would directly thwart the accomplishment of the explicit mandates of the Clean Water Act, and would, therefore, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The City argues that this result would somehow implicate the Tenth Amendment. We do not see how it could. The Tenth Amendment provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Clean Water Act is a valid exercise of the Commerce Clause power delegated to the United States by the Constitution. *United States v. Riverside Bayview Homes, Inc., et al.*, 474 U.S. 121, 133 (1985). The City does not cite, and we are not aware of, any authority supporting the proposition that, in the event of a conflict, a State statute must be given precedence over a valid exercise of Congress' constitutionally delegated powers.

it would be useful to have the parties brief this issue. Accordingly, we are granting review of the issue of whether the Iowa moratorium statute is of a character that could lay the necessary groundwork for authorizing a schedule of compliance, as contemplated in *Star-Kist*. Briefing on the issue will follow the schedule set out in the conclusion of this decision.

The final issue to be resolved in our *Star-Kist* analysis is whether the Region is in any event precluded from giving effect to Iowa's moratorium statute by the fact that the statute apparently was never submitted to EPA for review and approval. Under 40 C.F.R. § 131.13, a State has authority to include in its water quality standards, at its discretion, "policies generally affecting their application and implementation, such as mixing zones, low flows and variances." [12] In *Star-Kist*, the Agency noted that "schedules of compliance fall within the category of `policies' listed in this regulation." *Star-Kist*, 3 E.A.D. at 182-183, n.16. Such State policies are required to be submitted to EPA for review and approval. [13] From the record before us, however, it does not appear that the moratorium statute was ever submitted for EPA's approval. [14] The significance of the statute's lack

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[12] 40 C.F.R. § 131.13 provides as follows:

> States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.

[13] *See* 40 C.F.R. § 131.20, which provides in pertinent part as follows:

> (a) *State review*. The State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. * * *
>
> * * * * *
>
> (c) *Submittal to EPA.* The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, *any general policies applicable to water quality standards* and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.

[14] EPA authorized Iowa to administer the NPDES program on August 10, 1978. Response to Public Comments on EPA's Objection to State's Draft Permit at 2, Attachment I, Region's Response to Petition. Iowa's legislature amended its water pollution control statutes in 1979, to add

(continued...)

of approval to the issue of whether the statute can nonetheless provide a basis for a compliance schedule was not focused on or briefed by the parties. The *Star-Kist* decision does not specifically address whether a permit may contain a schedule of compliance when the authorizing State statute or regulation was never submitted for EPA review and approval. We also know of no statutory or regulatory provisions that squarely address the issue, [15] and believe it would be useful to have the parties brief this issue. [16] Accordingly, we are granting review of the issue of whether the Region is precluded from giving effect to the moratorium statute because the statute was apparently never approved by EPA. Briefing on the issue will follow the schedule set out in the conclusion of this decision.

Before we leave the subject of the moratorium statute, there is one more issue that must be resolved. In its response to the City's petition, the Region presents an alternative argument as to why a schedule of compliance would not be appropriate in this case. The Region contends that even if the moratorium

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[14](...continued)
the moratorium provision. *Id*. Based on the following Regional response, however, we assume that the statute was never submitted to EPA for review and approval:

> Comment: One commenter believes that EPA accepted the concept of the moratorium either through specific acknowledgment or through lack of objection to its previous implementation by the State of Iowa.
>
> Response: EPA has never taken the position that the moratorium provision in the statute is consistent with the Clean Water Act. The Ames permit is the first NPDES permit which EPA has had occasion to review, under the Memorandum of Agreement with IDNR for implementing [the] NPDES permit program, whose effluent limitations were justified solely on the basis of the moratorium. Several other permits raising the moratorium issue have recently been objected to, as well.

Id. at 10-11.

[15] We note that as to water quality standards submitted to EPA and subsequently disapproved, 40 C.F.R. § 131.21(c) provides that:

> A State water quality standard remains in effect, even though disapproved by EPA, until the State revises it or EPA promulgates a rule that supersedes the State water quality standard.

We find no corresponding rule, however, for provisions never submitted to EPA.

[16] While the two issues for which review is being granted are implicit in the specific issues raised on appeal, we note that, in any event, the Board "may raise and decide other matters which it considers material on the basis of the record." 40 C.F.R. § 124.91(h).

statute authorizes a schedule of compliance, including such a provision in the City's permit would not be consistent with EPA's regulatory requirements for such provisions. Because resolution of this issue in favor of the Region would make the grant of review discussed above unnecessary, it makes sense to address the Region's alternative argument now.

The Region argues specifically that a schedule of compliance in this case would be inconsistent with the requirement contained in 40 C.F.R. § 122.47(a)(1), which provides as follows:

> *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

The Region asserts that "the City already is fundamentally in compliance with the new and more stringent limits * * *." Region's Response to Petition at 18. Because compliance is already "possible" within the meaning of section 122.47(a)(1), the Region argues that any compliance schedule allowing additional time would not "require compliance as soon as possible," within the meaning of that section.

The City, however, disputes the Region's assertion respecting the compliance status of the facility. It argues in its appeal brief that there is "an immediate risk of non-compliance" with the permit's "one-day maximum" limits for ammonia nitrogen and CBOD5, a risk that increases as the POTW's operating level increases towards design capacity. Even at reduced capacity, the City "did experience two days of violation with the [proposed] `maximum day' ammonia limitation." Petition at 5. [17]

Based on the arguments presented on appeal, we cannot conclude as a matter of law that the City is now "fundamentally in compliance" with the permit's effluent limitations for ammonia nitrogen and CBOD5 and that no compliance schedule can be included in the permit for one or both of those limitations. Rather, whether the City is able to comply with those limitations at this time is an issue of fact that should be decided in the first instance at the

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[17] The City also argues that "[t]he imposition of the `one-day maximum' instead of an `average' limit will take from the Petitioner its investment backed expectation for treatment capacity constituting an economic loss to the Petitioner in excess of $2,300,000.00." Petition at 4. While the City does not further explain this issue, we interpret it as merely a restatement of its view that it cannot currently operate at full capacity while in compliance with the maximum daily limit.

Regional level. Whether we ultimately remand for this purpose will depend on how the issue for which we have granted review is resolved. At this point, we note only that the Region's alternative argument is unavailing at this time and thus does not eliminate the need for resolving the issue for which review has been granted.

B. *Maximum Daily Limits*

The renewal permit being challenged states the effluent limitations for ammonia nitrogen and CBOD5 as maximum daily limits and monthly average limits. Attachment U, Region's Response to Petition. In its appeal brief, the City argues that "expressing effluent limits for a POTW as `maximum daily' is a violation of 40 CFR [§] 122.45(d)(2)." Section 122.45(d) provides as follows:

> *Continuous discharges.* For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, *shall unless impracticable be stated as*:
>
> (1) Maximum daily and average monthly discharge limitations for all discharges other than publicly owned treatment works; and
>
> (2) *Average weekly and average monthly discharge limitations for POTWs*.

(Emphasis added.) The City points out that under "Section 455B.173(2), Code of Iowa * * * an effluent standard `shall not be more stringent than the federal effluent ... standards for such source.'" The City argues, therefore, that the Iowa law cannot prescribe maximum daily limits for a POTW, since those would be more stringent than is prescribed by section 122.45(d), which requires that discharge limits for POTWs be stated as weekly and monthly average limits "unless impracticable."

In its response to the City's petition, the Region argues: "Iowa Water Quality Standards require inclusion of daily maximum limits in the City's permit." Region's Response to Petition at 12-13. The Region also contends that:

> The requirements for average weekly and average monthly discharge limitations under 40 C.F.R. 122.45(d)(2), are not exclusive and do not prohibit the inclusion of daily limits as

> required under Iowa law. Including maximum daily limits as well as average weekly and average monthly limits in the City's permit does not render the permit less stringent, and is required by Iowa law to meet EPA-approved Iowa Water Quality Standards * * *.

Region's Response to Petition at 14-15. For the reasons set forth below, we are remanding the "daily maximum" issue to the Regional Administrator for reconsideration.

In its evidentiary hearing request, the City raised two issues related to the use of maximum daily limits in the renewal permit. First, the City raised what it described as a legal issue, as follows: whether "the maximum daily discharge limit for CBOD5 and ammonia nitrogen is a violation of 40 CFR 122.45(d)(2)." The City also raised what it described as a factual issue, as follows:

> The EPA contention that a maximum daily limit for ammonia may be imposed because it is impracticable to meet water quality standards by using an average weekly limit is not well founded. It is practicable to meet water quality standards using an average weekly limit for ammonia.
>
> * * * * *
>
> This issue of fact is relevant to the pertinent decision in that the use of the maximum daily limit for ammonia in the NPDES permit has the effect of unreasonably increasing the risk of non-compliance with a resulting substantial increase in operating costs to avoid non-compliance.

Attachment U, Region's Response to Petition.

The Regional Administrator determined that the first issue mentioned above was a "strictly legal question[]," and denied an evidentiary hearing on that basis. [18] Attachment V, Region's Response to Petition. With respect to the

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[18] *See* 40 C.F.R. § 124.74(b)(1)(note)(where no factual issues are raised, Regional Administrator is required to deny any legal issues, so that they may be decided by the Environmental Appeals Board).

second issue mentioned above, the Regional Administrator denied the evidentiary hearing request for the following reason:

> Inclusion of daily maximum limits, instead of weekly average limits for ammonia and BOD5, was a condition of the Iowa Department of Natural Resources' certification of this NPDES permit, as required by Section 401 of the Clean Water Act (CWA). Inclusion of a weekly average limitation would result in a lower number that would be statistically equivalent to the limit already in the permit, and would neither increase nor decrease the risk of noncompliance. There is, therefore, no material issue of fact.

Attachment V, Region's Response to Petition.

From the passage quoted above, it is apparent that when he denied the City's evidentiary hearing request on this issue, the Regional Administrator was under the impression that the challenged daily maximum limits were a condition of the State's certification. [19] A permit provision that is required as a condition of State certification is considered "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e) [20] and thus not reviewable by the Agency. [21] The Region now concedes that the maximum daily limits are not "attributable to state certification." Region's Response to Petition at 14, n.3. The Region points out, however, that the Regional Administrator did not rely solely on State certification grounds in denying an evidentiary hearing on this issue, but also included the following independent reason for his denial: Replacing the daily maximum limit with a weekly average would result in a statistically equivalent limit that would neither increase nor decrease the risk of non-compliance. Id.

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[19] Under CWA § 401(a)(1), the Agency may not issue a permit until the State either certifies that the permit complies with State water quality standards or waives certification. 40 C.F.R. § 124.53.

[20] *See In re General Electric Company, Hooksett, New Hampshire*, 4 E.A.D. 468, 471-472 (EAB 1993)(If State certification letter communicates idea that a permit requirement cannot be made less stringent and still comply with State water quality standards, the permit requirement is said to be "attributable to State certification.").

[21] *See* 40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.").

We conclude that the Regional Administrator's initial erroneous impression as to the certification status of the limitations in question requires a remand of this issue. Because the Regional Administrator apparently believed that the Agency did not have authority to review the issue, we cannot be sure that he gave the issue the full consideration necessary to support a limit in the absence of State certification. [22]

Another reason for remanding this issue is that the Regional Administrator appears to have misread section 122.45(d). In its response brief, the Region contends that section 122.45(d) allows the inclusion of maximum daily limits for POTWs, even when weekly averages and monthly averages are practicable. Region's Response to Petition at 14-15. As we read it, however, section 122.45(d) requires that *all* effluent limitations for POTWs be stated as weekly and monthly average discharge limitations, unless it is "impracticable" to do so. *See* 40 C.F.R. § 122.45(d). It appears that the Regional Administrator's denial of the City's evidentiary hearing request concerning this issue is based on the same erroneous reading of section 122.45(d) as is expressed in the Region's brief. This is suggested by the Regional Administrator's response to the City's evidentiary hearing request concerning the practicability of stating the effluent limitation for ammonia nitrogen as a weekly average limit rather than a maximum daily limit. In denying a hearing on this issue, the Regional Administrator did not directly address whether inclusion of a weekly average is impracticable. Rather, the Regional Administrator explained that the issue was not "material" because:

> Inclusion of a weekly average limitation would result in a lower number that would be statistically equivalent to the limit already in the permit, and would neither increase nor decrease the risk of noncompliance.

Attachment V, Region's Response to Petition. [23] The quoted statement suggests that the Regional Administrator believed that he could include a maximum daily

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[22] On February 22, 1995, the City filed a motion for leave to file a supplementary brief, accompanied by the brief itself. In the brief, the City argues that the Region's method of deriving maximum daily limits is flawed and results in overly stringent maximum daily limits. We view this issue as distinct from the issue of whether including any maximum daily limits in the permit violates section 122.45(d). Because the supplementary brief raises a new issue and was filed after the appeal period under section 124.91(a) had passed, we are denying the City's motion for leave to file its supplementary brief.

[23] *See* 40 C.F.R. § 124.75(a) (evidentiary hearing request must "set forth material issues of fact relevant to the issuance of the permit.").

limit that reflected the same level of stringency as would a weekly average, without first determining that a weekly average is impracticable. However, as the regulation makes clear, the Regional Administrator does not have unlimited discretion to include daily limits; maximum daily limits may be included in a permit for a POTW only if weekly average limits are impracticable. Because resolution of the issue of the practicability of weekly average limits could ultimately result in a change in permit terms, it would appear to be a material issue of fact. *See In re Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 781 (EAB 1993) ("A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding."). Thus, it is not clear how the Regional Administrator came to the conclusion that the City has not raised a material issue of fact.

For all the foregoing reasons, we are remanding this issue to the Regional Administrator. [24] On remand, the Regional Administrator is directed to reconsider the factual issue of whether it would be practicable to state the effluent limitations for ammonia nitrogen and CBOD5 as weekly and month averages. If it would be practicable, then such averages should be included in the permit and the daily maximum limits should be removed. If the City is not satisfied with the results of the re-opened proceedings, it may submit a new evidentiary hearing request raising the issue. [25]

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[24] Although 40 C.F.R. § 124.91 contemplates that further briefing will ordinarily be required upon a grant of a petition for review, "a direct remand without additional submissions is appropriate where as here, it does not appear as though further briefs on appeal would shed light on the issues [to be] addressed on remand." *In re Florida Pulp and Paper Association & Buckeye Florida, L.P.*, 5 E.A.D., NPDES Appeal Nos. 94-4 & 94-5, slip op. at 20 n.24 (EAB 1995) (*quoting In re Amoco Oil Company Mandan, North Dakota Refinery*, 4 E.A.D. 954, 982 n.38 (EAB 1993)).

[25] In the event the City requests an evidentiary hearing, it might be advisable for the Regional Administrator to postpone the hearing until the Board has made a determination on the schedule of compliance issue so that the full scope of issues requiring a hearing is known and piecemeal hearings can be avoided.

III. *CONCLUSION*

In view of the foregoing discussion, we come to the following conclusions. With respect to Iowa's moratorium statute, we are granting review of the following issues: Whether the Iowa moratorium statute is of a type that could authorize establishing a compliance schedule under *In re Star-Kist Caribe, Inc*. and if so, whether the fact that Iowa's moratorium statute was apparently never approved by EPA precludes the Region from giving consideration to it for this purpose. Pursuant to 40 C.F.R. § 124.91(g), the City is required to file a brief on this issue within 21 days after service of this Order. The Region is required to file a responsive brief within 21 days of service of the City's brief, and the City may, if it chooses, file a reply brief within 14 days of service of the responsive brief. Any person may file an amicus brief for the consideration of the Board within the same time periods that govern reply briefs.

With respect to the inclusion of daily maximum limits in the permit, we conclude that: (1) The Regional Administrator erroneously relied upon State certification in denying a hearing on the permit's maximum daily limits for ammonia nitrogen and CBOD5; and (2) The Regional Administrator appears to have misread section 122.45(d) to mean that maximum daily limits may be included in the permit even if the Region can ensure compliance with Iowa's water quality standards by including weekly average limits. In view of the foregoing conclusions, we are remanding the following issue to the Regional Administrator: Whether weekly average limits for those two pollutant parameters are "impracticable" for purposes of section 122.45(d). With respect to this issue, the Regional Administrator is directed to re-open the permit proceedings for reconsideration of the issue in a manner consistent with this decision. Upon completion of that reconsideration, if the City believes that the results of the proceedings are erroneous,

the City may submit a new evidentiary hearing request raising the issue for consideration under section 124.74. [26]

So ordered.

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[26] With respect to the Tenth Amendment issue raised in the City's petition, we are denying review. *See supra* n. 11. All of the remaining issues raised in the City's petition are either subsumed under or addressed by either the issue for which review is being granted or the issue that is being remanded.